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In the

Supreme Court of the United States

October Term, 1946

petition not printed

No. 1322

BENNETT MELLEN, a Minor, by his father and next friend JOSEPH H. MELLEN,
Petitioner,

v.

H. B. HIRSCH & SONS, HERBERT B. HIRSCH, JERRY B. HIRSCH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 20) is reported at 159 F 2d 461.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered February 3, 1947 (R. 21, infra p. 12a), and a petition for rehearing (R. 22, ~~infra, p. 9a~~) was denied February 19, 1947 (R. 41, infra p. 13a). The petition for a writ of certiorari was filed May 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

Petitioner filed a complaint in the District Court of the United States for the District of Columbia seeking to recover money damages from respondents for injuries that arose out of and in the course of his employment with Respondents (R. 2-7, infra pp. 1a-6a). Petitioner concedes that Alice Sheldon, named as a defendant in said complaint, is not a party to this appeal or here involved (Pet. 4).

The complaint alleges, in substance, that the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia (hereinafter referred to as the Longshoremen's Act, infra pp. 13a, 14a), does not apply to petitioner as he was hired by respondents in violation of the Child Labor Law in force in the District of Columbia (infra pp. 14a, 15a).

Respondents filed a motion to dismiss said complaint on the ground that the Longshoremen's Act provides an exclusive remedy for petitioner (R. 9, 10, infra p. 7a). The motion to dismiss the complaint was set for oral argument before Justice Jennings Bailey on May 28, 1946. At that hearing petitioner and respondents agreed to submit the case on the pleadings (R. 17, 18, infra pp. 10a, 11a, 12a). Justice Bailey ordered the motion to dismiss

sustained and the complaint dismissed (R. 11, 12, infra pp. 8a, 9a). A motion for a rehearing was filed by petitioner and overruled by the Court (R. 12, 13, infra pp. 9a, 10a). On appeal to The United States Court of Appeals for the District of Columbia, the judgment was affirmed (R. 21, infra p. 12a).

STATUTES INVOLVED

The pertinent provisions of The Longshoremen's Act and The Child Labor Law are set forth in the Appendix (infra pp. 13a, 14a, 15a).

QUESTION PRESENTED

The principal question presented is whether or not The Longshoremen's Act provides an exclusive remedy for petitioner notwithstanding the alleged violation of the Child Labor Law.

ARGUMENT

Petitioner contends that no legal contract of employment existed between the parties since the employment was expressly forbidden by the Child Labor Law; that if there was no contract of employment, the relationship of employer and employee did not exist and that consequently the Compensation Commission of the District of Columbia could not take jurisdiction of this case.

Petitioner admits in his complaint that he was employed by respondents, and his injury arose out of and in the course of his said employment (R. 2-7, infra pp. 1a-6a). He does not allege that respondents have failed to secure the payment of compensation to their employees, or failed to comply with the requirements of The Longshoremen's Act. In this setting the principal question is whether petitioner, by reason of his alleged employment in violation of the Child Labor Law, can sue his employer in an action

at law or whether the Longshoremen's Act provides an exclusive remedy for petitioner.

We submit that section 905 of The Longshoremen's Act (infra p. 14a) provides an exclusive remedy for petitioner under such circumstances, stating "The liability of an employer * * * shall be exclusive and in the place of all other liability of such employer to the employee * * * except that if an employer fails to secure the payment of compensation as required by this chapter, an injured employee * * * may elect to claim under this statute, or to maintain an action at law * * * for damages on account of such injury. * * *"

This language, which is clear and unambiguous, precludes employees from maintaining an action at law against their employers to recover money damages for their injuries. Congress, as noted above, made an exception to this provision. Petitioner does not contend that his case is within the stated exception. If Congress had intended to make an additional exception for persons employed in violation of the Child Labor Law, it could have so stated.

Congress, in Sec. 911 of the Longshoremen's Act (infra p. 14a), plainly indicates its intent to afford minors equal protection with adults under The Longshoremen's Act.

A careful examination of the authorities reveals no decision interpreting this particular provision of The Longshoremen's Act. However, similar provisions in State Compensation Acts have been construed, and it has been held that the remedy of a minor employee under such Acts is exclusive notwithstanding a violation of the Child Labor Law.

In *Noreen v. William Vogel & Bros. Inc.* (1921), 231 N. Y. 317, 132 N. E. 102, the New York Court of Appeals, in a case similar to the instant case, said:

> "Irrespective of the fact that the plaintiff secured employment by misrepresentation as to his age and

that the defendant omitted the exercise of due diligence to ascertain his age, when plaintiff entered upon the service of the defendant in consideration of a compensation to be paid him therefor the relation of employer and employee existed between them. * * * When the employment is entered upon, the law determines the relations, rights and remedies of the parties. Here the relation of employer and employee existed within the spirit and letter of the Workmen's Compensation Law. * * *"

The reasons underlying the rule followed in the instant case are well stated in *Humphrees v. Boxley Brothers Company* (1926) 146 Va. 91, 135 S. E. 890, where the Court, in construing a similar provision of the Virginia Workmen's Compensation Act, said (P. 101):

> "The legislature by extending the benefits of the act to all infants, whether legally employed or not, 'does not recognize the right of the factory owner and the parent to disregard the mandate of this statute and make a contract for the employment of the boy which might or might not have read into it the provisions of the workmen's compensation act, as the master and the parent between them should elect.' On the contrary, it says to the employer, if you employ an infant contrary to the child labor law, not only shall you incur the penalty denounced by that statute, but in addition you shall waive all questions of your own negligence, and all common law defenses you may have to an action for the injury, and pay to the infant the sums prescribed by the compensation act. These are matters directly for the benefit of the infant, in aid of the child labor law, and tend to prevent the employment of children in contravention of the child labor statute."

See to the same effect:

Rasi v. Howard Mfg. Co. (1920) 109 Wash. 524, 187 P. 327.

Pierce's Case (1929) 267 Mass. 208, 166 N. E. 636.

Kenez v. Novelty Compact Leather Co. (1930) 111 Conn. 229, 149 A. 679.

Boyle v. A. C. Cheney Piano Action Co. (1920) 193 App. Div. 408, 184 N. Y. S. 374.

Taswell v. General Matt Co., Inc. (1941) 30 N. Y. S. (2d) 145.

Dienert et al v. Handy-Andy Specialty Co., Inc., (1939) 16 N. Y. S. (2d) 160.

Cf. *Rowlette v. Rothstein Dental Laboratories,* (1933) 61 App. D. C. 373, 63 F. (2d) 150.

While authority exists in some jurisdictions to the contrary, the language of the statutes construed in those cases differs materially from The Longshoremen's Act. See *Humphrees v. Boxley Brothers Company, supra.*

The foregoing analysis of the terms of The Longshoremen's Act and the decisions cited in support of Respondents position demonstrates that the violation of the Child Labor Law while subjecting the employer to the penalties mentioned therein (§ 36-215, D. C. Code, 1940 ed., infra p. 15a), it does not prevent the relationship of employer and employee from coming into existence, or affect the rights incident thereto, and does not render The Longshoremen's Act inapplicable.

Petitioner also contends that the construction placed on the New York Compensation Act in *Noreen v. William Vogel & Bro., Inc., supra,* should not be followed as The Longshoremen's Act was not adopted in verbatim, or in toto from the New York statute.

"The Longshoremen's Act followed in the main The Workmen's Compensation Law of the State of New York. It is familiar law that whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which have received in that state a known and settled construction before their enactment by Congress, that construction will be deemed to have been adopted by Congress together with the text which it expounded, and the provisions will be construed

as they were understood at that time in the State." *Hartford Accident & Indemnity Co. v. Hoage* (1936), 66 App. D. C. 154, 85 F (2d) 411. It follows that the rule announced in the *Noreen* case, supra, should be adopted by this Court for this jurisdiction.

Petitioner's contention that the *Noreen* case should not be followed here, as it was based upon a section of the New York Compensation Act (Sec. 14A) which was not included in The Longshoremen's Act, is clearly without merit. Section 14A of the New York Compensation Act (the double award provision of the New York Act in the case of minors employed in violation of the Child Labor Law) does not change the rule, as it was added to the New York Compensation Act subsequent to the decision in the *Noreen* case. The *Noreen* case was decided in 1921, and Section 14A was included in the New York Compensation Act in 1923. No other difference between the two statutes is suggested by petitioner.

Petitioner's further complaint that he was denied the right to be heard is likewise unavailing for he expressly consented to submit the case on the pleadings (R. 18, infra p. 11a). The District Court had authority to decide petitioner's motion for a rehearing (R. 12, infra p. 9a) without an oral hearing. "An oral hearing will not be allowed, unless directed by the Court, upon a motion to rehear, or to vacate • • • an order • • •." Rule 9 (f) Local Civil Rules of the District Court of the United States for the District of Columbia. Petitioner's motion for a rehearing did not present anything that had not already been considered by the Court in deciding the complaint on its merits.

Petitioner asserts that the writ of certiorari should be granted under the authority of *Del Vecchio v. Bowers*, (1935), 296 U. S. 280, 80 L. Ed. 229. The *Del Vecchio* case is distinguished readily from the instant case in that there the Court was considering only The Longshore-

men's Act, whereas in this case the Court is considering a law that is limited in its application to the District of Columbia (Child Labor Law), as well as The Longshoremen's Act. "Only in exceptional cases will the Supreme Court of the United States review a determination of a question of local law of the District of Columbia by the District of Columbia Court of Appeals." *Busby v. Electrical Utilities Employees Union,* (1944), 323 U. S. 72, 89 L. Ed. 78. Moreover, this Court did not intend by its decision in the *Del Vecchio* case to make it mandatory for the Court to review all controversies that arise in the District of Columbia under The Longshoremen's Act. To attempt to do so would place a heavy and unnecessary burden on this Court. The *Del Vecchio* case, in line with Rule 38 of the Supreme Court rules, implies that it is within the discretion of this Court to determine whether the decision of the lower court presents a question of general importance requiring a review on certiorari. No such question of general importance is presented in the instant case, where the problem before the lower court was a simple one of statutory construction. To reach a result contrary to the decision below would be to distort the plain language of the statutes here involved.

Petitioner asserts further that there is a conflict between the decision below and the decision of the Third Circuit in the case of *Klicke v. Allegheny Steel Company,* 200 Fed. 933, and also the decision of this Court in *Crowell v. Benson,* 285 U. S. 22, 76 L. Ed. 598. His assertion in this regard is without merit. In the *Klicke* case the question of the applicability of the Pennsylvania Compensation statute, which differs materially from The Longshoremen's Act, was not even discussed in the opinion of the Court. *Crowell v. Benson* presents no conflict with the decision below as the lower court held that the relationship of employer and employee existed between the parties to this appeal following the rule of *Crowell v. Benson* in this regard.

CONCLUSION

The decision below is clearly correct, and there is no real conflict of decisions or question of general importance involved. We therefore respectfully submit that a petition for a writ of certiorari should be denied.

W. Edwin Cumberland
Julian H. Reis
Lewis Jacobs

1426 H Street, N. W.
Washington, D. C.

Counsel for Respondents

APPENDIX

[Only pertinent portions of the record are here included]

IN THE DISTRICT COURT OF THE
1 UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 33825

Bennett Mellen, a minor
by his father and next friend
Joseph H. Mellen,
928 Longfellow Street, N. W.,
Washington 11, D. C.
Plaintiff.

vs.

Henry B. Hirsch,
903 Quincy Street, N. W.,
Washington, D. C.
et al

Complaint for damages for personal injury (wrongfully employing minor child in violation of Child Labor Law).

Now comes Bennett Mellen, an unemancipated minor, by his father and next friend and says: That he is a minor under the age of twenty-one years, to-wit, of the age of fifteen years; that he was born in the city of Cleveland, County of Cuyahoga, and State of Ohio, on the 4th day of April, 1930.

1. That the minor plaintiff and his father as his next friend, are both citizens of the State of Ohio while the defendants, each and all of them, are citizens of the Dis-

trict of Columbia, that the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2 2. The minor plaintiff says that prior to, at the time of, and since the time of the wrongs and grievances hereinafter complained of, the defendants Henry B. Hirsch, Jerry Hirsch, Robert Hirsch and Melvin J. Hirsch, were co-partners, doing business and trading under the firm name and style of H. B. Hirsch and Sons, and/or District Awning and Shade Company, with offices and factory located at No. 4410 Georgia Avenue, northwest, in the City of Washington, District of Columbia, and were engaged in the manufacture of awnings, window shades, duffelbags, and other divers products and maintained and used in connection with their said business, divers machines and machinery which were driven and operated rapidly by means of electric current and electric power, and that among said machines and machinery were a riveting and gromment machine.

3. That the defendant Alice C. Sheldon prior to, at the time of, and since the time of the wrongs and grievances hereinafter complained of, was the duly appointed, qualified and acting Director of the Department of School Attendance and Work Permits, of the Public Schools of the City of Washington, and of the District of Columbia, designated as such by the Board of Education of the said District of Columbia, to have charge of the issuance of work and vacation permits to minor children and to administer as well as to enforce the provisions of a statute known as the Child Labor Law of the District of Columbia.

4. That prior to, at the time of, and ever since the time of the wrongs and grievances hereinafter complained of, there was in full force and effect in the City of Washington and in the District of Columbia, a statute, to wit: Public Law No. 618—70th Congress, entitled "An Act to regulate the employment of minors within the District of Co-

lumbia, approved May 29, 1928, et seq., which Act has since become a part of the District of Columbia Code and appears therein as Title 36 thereof, which statute is by reference made a part hereof as if the same had been in words and in figures fully written herein at length.

5. For his cause of action against the defendants and each of them, jointly and severally, this minor plaintiff says; that on or about the 22nd or 23rd day of July, 1945, he applied to the defendant Alice C. Sheldon in her capacity as Director, as aforesaid, for a work permit so as to accept gainful employment with the defendants H. B. Hirsch and Sons; that the defendant Alice C. Sheldon, in utter disregard of and in violation of the provisions of the aforesaid statute, wantonly, maliciously, recklessly, carelessly, negligently and unlawfully issued to this minor plaintiff, a paper writing purporting to be a work permit, but which was not in fact and in law not a permit at all, and hence was null, void, and of no legal force and effect whatsoever. The minor plaintiff says, that the defendant Alice C. Sheldon was wanton, malicious, reckless, careless and grossly negligent in the issuance of the aforesaid work permit, in the following respects, to-wit: (a) in that she issued a paper writing purporting to be a work permit which authorized the employment of the minor plaintiff on a machine driven by power other than hand or foot power, namely by electric current and electric power in violation of Title 36, section 204, of the District of Columbia Code, or the statute above referred to; (b) in that she issued a paper writing purporting to be a work permit to the minor plaintiff without requiring the employer of the minor plaintiff to set forth the nature of the specific occupation in which the alleged work permit authorized the minor plaintiff to be employed contrary to and in violation of Title 36, section 209 of the District of Columbia Code, or the statute above referred to; and (c) in that the defendant Alice C. Sheldon issued the alleged work permit to the minor plaintiff at the time

when the said minor plaintiff was under sixteen years of age, and was at the said time unaccompanied by his parent, guardian, or custodian as required by Title 36, section 210, of the District of Columbia Code or the statute above referred to and in violation thereof.

6. The minor plaintiff further says, that after obtaining the purported work permit, he presented the same to the defendants Henry B. Hirsch and Mervin J. Hirsch in their office at the address given above, both of said defendants having full knowledge and were well aware of the fact that he was under the age of sixteen years, nevertheless, on the 23rd day of July, 1945, they employed, suffered, permitted and directed him to operate a riveting machine for a part of that day and thereafter ordered and directed him to operate a gromment machine in violation of the referred to statute; that said machines were driven by electric current and electric power; that he was given little, if any instruction in the use and operation of the said machines; that thereafter, to-wit: on July 30, 1945, along about the hours of 3:00 to 4:00 o'clock of the afternoon of that day and date, while engaged in work of inserting gromments in duffelbags as directed and required of him by the defendants Henry B. Hirsch and Sons, all of which was within the line of his duty and the scope of his employment and for the benefit of the said defendants, the thumb of his left hand was caught and jammed in the said gromment machine, causing the said thumb to become mashed, mangled and torn, causing a penetrating wound through the said thumb at the base of the distal phalanx, and a compound fracture of the distal phalanx, a splintering of the bone of the said thumb; that by reason of the said injury, the said Henry B. Hirsch and Mervin J. Hirsch, unbeknown to the minor plaintiff's parents and without their knowledge and consent removed the minor plaintiff from their premises at 4410 Georgia Avenue, northwest, Washington, District of Columbia, to a place known as the Washington Insurance

Clinic, 1723 Rhode Island Avenue, in the aforesaid city and district, where the minor's thumb was examined, soaked in a solution of one kind or another, dressing applied, and the minor was thence removed without the knowledge and consent of his parents, or either of them, to the Providence Hospital, in the said city and district, and on the 31st day of July, 1945, the services of a medical surgeon was obtained to remove the loose fragments of broken bone in the left thumb and the minor plaintiff was required to remain in the said hospital for a period of sixteen days undergoing treatment for the said injury; that the employment of the said minor plaintiff to operate the said machines was unlawful and was due to wantonness, negligence, carelessness, maliciousness, and recklessness on the part of the defendants Henry B. Hirsch and Mervin J. Hirsch and the co-partnership of which they were members and to their violation of the Child Labor Law, hereinbefore referred to. The minor plaintiff further says that, prior to the injury complained of, he suffered from a heart ailment which was well known to the defendants and to the examining physician of the School Board, all of which will appear from an examination of the records of the Board of Education, and that by reason of the injury his heart condition has become aggravated.

7. The minor plaintiff says further that, as a direct result of the negligence, as aforesaid, of the defendants, he was greatly wounded about his left hand, suffered a severe shock to his entire nervous system, became and was sick, sore and disordered in mind and body and has continued so and still does so remain and continue up to the present time; that as a result of the said injury, the minor has suffered and still suffers great bodily pain and mental distress and it is likely that he will suffer great pain and suffering in the future; that the said left thumb has become stiff and numb and does not bend at the joint as it was wont to do prior to the injury; that

he has become liable for and will be compelled to pay large sums of money for medical, hospital, and nurses' expenses for treatment he has received and will be compelled to spend further sums of money for medical, hospital, and nurses' expenses for a time not now determinable; that due to the left thumb having become stiff and unbendable at the joint, he believes and therefore alleges that the injury he has sustained is permanent and that his future earning capacity has been seriously and permanently impaired thereby, and hence that, in the circumstances hereinbefore set out, he is entitled to and claims compensatory and exemplary damages.

8. The minor plaintiff further says that by reason of his employment having been in violation of the Child Labor Law and unlawful, the relationship of employer and employee did not and cannot exist, hence he is not subject to and not embraced within the provisions of an Act of Congress approved May 17, 1928, known as the LONGSHOREMEN'S and HARBOR WORKERS' COMPENSATION ACT, and he is compelled to resort to his common law action of trespass for the redress of the wrongs committed against him by the defendants, jointly and severally and for the injuries sustained by him as aforesaid.

9. Wherefore, the minor plaintiff brings this action by his father and next friend against the above named defendants, jointly and severally, and prays for a judgment against each and all of them in the sum of FIFTEEN THOUSAND DOLLARS ($15,000) His damages sustained as aforesaid.

BENNETT MELLEN,
Minor Plaintiff.

JOSEPH H. MELLEN,
Father and Next Friend.

• • • •

Motion to Dismiss Complaint

Defendants, H. B. Hirsch & Sons, and/or District Awning and Shade Company, and Henry B. Hirsch, Jerry B. Hirsch, Mervin J. Hirsch, co-partners, tr/as H. B. Hirsch & Sons, and/or District Awning and Shade Company, move the Court as follows:

I. To dismiss, as to them, the Complaint filed herein by the plaintiff on the ground that the Court lacks jurisdiction of the subject matter, as the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code, Title 33, Chapter 18), as made applicable to the District of Columbia (D. C. Code, 1940 ed., sec. 36-501 et eq.), provides an exclusive remedy thereunder for plaintiff.

II. To dismiss the action on the ground that plaintiff's complaint fails to state a claim against said defendants upon which relief can be granted.

CUMBERLAND AND JACOBS
LEWIS JACOBS
JULIAN H. REIS

Woodward Building,
Washington, D. C.
Attorneys for Defendants,

H. B. Hirsch & Sons and/or District Awning and Shade Company and Henry B. Hirsch, Jerry B. Hirsch, Mervin J. Hirsch, co-partners, tr/as H. B. Hirsch & Sons, and/or District Awning and Shade Company.

* * * *

11 Civil Action No. 33825

Mellen & c

vs.

Hirsch et al.

The Court of Appeals of this District in the case of Hartford Accident & Indemnity Co. vs. Hoage, 66 App. D. C. 154, held that the Longshoremen's Act, which was enacted in 1927 was almost identical with the Workmen's Compensation Act of New York and that when Congress has borrowed from the statutes of a state provisions which have received a known and settled construction by the Courts of that state, that construction will be deemed to have been adopted by Congress. In the instant case a provision in the Workmen's Compensation Law of New York is substantially the same as §905 of U. S. C. A., Title 33, chapter 18. That provision was construed in the year 1921 by the Court of Appeals of New York in 231 New York, 317 and this Court will follow that holding.

The result is that the remedy of the plaintiff under the Longshoremen's Act is exclusive and the motion to dismiss will be sustained.

BAILEY J.

• • • •

12 *Order Dismissing Complaint*

Upon consideration of the motion to dismiss complaint filed herein on the 16th day of May, 1946, by the defendants, H. B. Hirsch & Sons, and/or District Awning and Shade Company, and Henry B. Hirsch, Jerry B. Hirsch, Mervin J. Hirsch co-partners, tr/as H. B. Hirsch & Sons, and/or District Awning and Shade Company, and the memorandum of points and authorities in opposition thereto filed herein on the 20th day of May, 1946, by the plaintiff, it is, this 3rd day of June, 1946, by the Court,

ORDERED that the motion to dismiss complaint filed by said defendants be, and the same hereby is, sustained,

and the complaint filed herein by the plaintiff be, and the same hereby is, dismissed.

JENNINGS BAILEY,
Justice.

No objection as to form.

JOSEPH H. MELLEN
BENNETT MELLEN, a minor by his
Father and next friend,
JOSEPH H. MELLEN.

Plaintiffs excepts to the ruling and notes an exception.

Joseph H. Mellen, in Proper Person.

13 *Motion to vacate and set aside the Order Dismissing the Complaint in the above entitled cause and grant a re-hearing of the motion to dismiss.*

Comes now Bennett Mellen, plaintiff in the above entitled cause by his father and next friend, and respectfully moves this Honorable Court to vacate and set aside the Order of this court dismissing the complaint in the said cause entered June 3, 1946, and to grant unto this plaintiff a re-hearing of the motion previously filed by the above named defendants and for grounds therefor refers to Plaintiff's Memorandum of Points and Authorities in support thereof.

BENNETT MELLEN,
a minor, by his Father and Next Friend
JOSEPH H. MELLEN,
Father and Next Friend.

Oral Hearing requested.

Time requested for argument—

30 minutes. J. H. MELLEN.

• • • •

14 *Order Overruling Motion to Vacate and Set Aside the Order Dismissing the Complaint in the Above-Entitled Cause and Grant a Re-hearing of the Motion to Dismiss.*

Upon consideration of the motion to vacate and set aside the order dismissing the complaint in the above-entitled cause and grant a re-hearing of the motion to dismiss, filed by the plaintiff, and the memorandum in opposition thereto, filed by defendants, H. B. Hirsch & Sons, and/or District Awning and Shade Company, and Henry B. Hirsch, Jerry B. Hirsch, Mervin J. Hirsch, co-partners, tr/as H. B. Hirsch & Sons, and/or District Awning and Shade Company, it is, this 20th day of June, 1946, by the Court,

ORDERED that plaintiff's motion to vacate and set aside the order dismissing the complaint in the above-entitled cause and grant a re-hearing of the motion to dismiss be, and the same hereby is, overruled.

JENNINGS BAILEY,
Justice.

No objection to form.

BENNETT MELLEN, a minor by his
father and next friend, JOSEPH H. MELLEN.

Plaintiff excepts to the above ruling and order, notes an exception thereto and gives notice of appeal. JOSEPH H. MELLEN, in Proper Person.

• • • •

24 Tuesday, May 28, 1946.

The above-entitled cause came on for hearing before Associate Justice Jennings Bailey at 10:50 a. m.

• • • •

25 Mr. Jacobs. This is a motion to dismiss the complaint. It may be the right time to read it, your Honor.

The Court. Very well. Proceed.

Mr. Jacobs. If your Honor please, this is a complaint filed by an infant employee, seeking to recover damages against his employer at law for injury that he received in the course of the employment.

The complaint does not state that the employer has failed to secure compensation for his employees for injuries received by them. It takes the position—and I think this is a fair statement—that he was employed in violation of the child labor laws; that as a result of being employed in violation of the child labor laws, the relationship of employer and employee never existed and therefore the compensation statute is not applicable in the instant case.

We take the position that the relationship of employer and employee did exist; that the injuries arose in the course of his employment; that the remedy of the employee is exclusive under the Act; and that he is precluded from filing an action at bar against his employer.

The Court. I am not sufficiently familiar with that Longshoremen's Act to rule, without reading the Act carefully and the authorities cited. Are you willing to submit the case on the pleadings?

26 Mr. Mellen. Yes, your Honor, but I had one or two cases here that I did not cite in my brief, and I would like to add them.

The Court. Write those down on a piece of paper and let me have them, and I will take it under consideration. As I said, I am not sufficiently familiar with this Act to pass upon it without reading the Act fully and the authorities that are cited by both sides.

Mr. Jacobs. I might say that both of us have diligently searched for authority deciding the question under the Longshoremen's Act. I found none, and I think it is a novel question as far as the reported decisions are concerned. For that reason it will require careful consideration.

The Court. If you will, let me have your additional authorities. Just write them down on a piece of paper.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 9376

January Term, 1947.

Bennet Mellen, a Minor &c.,
Appellant,

vs.

H. B. Hirsch & Sons, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Columbia.

Before Edgerton, Clark and Prettyman, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Edgerton.

Dated February 3, 1947.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 9376

January Term, 1947.

Bennet Mellen, a minor, by his father and next friend, Joseph H. Mellen,
Appellant,

v.

H. B. Hirsch & Sons, Henry B. Hirsch, Jerry B. Hirsch, et al.,
Appellees.

Before Edgerton, Clark and Prettyman, JJ.

ORDER

Treating the petition for rehearing filed herein February 17, 1947, as a petition for rehearing addressed to the Court which heard the case as permitted under Rule 26, although erroneously addressed to each of the six judges, and having duly considered the petition, It is

ORDERED by the Court that the petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated February 19, 1947.

STATUTES

PERTINENT PROVISIONS OF THE LONGSHOREMEN'S ACT

§36-501, D. C. Code (1940 Ed.):

Chapter 5—Workmen's Compensation

The provisions of title 33, chapter 18, of the Code of Laws of the United States, including all amend-

ments that may be made thereto after May 17, 1928 [Longshoremen's and Harbor Workers' Compensation Act] shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, §1).

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509 (44 Stat. 1426, 1431), U. S. C., Title 33, §§905, 911.

§905: Exclusiveness of Liability.

The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . parents . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death . . . (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426, U. S. C., Title 33, §905.

§911: Guardian for minor or incompetent.

The deputy commissioner may require the appointment by a court of competent jurisdiction for any person who is mentally incompetent or a minor, of a guardian or other representative to receive compensation payable to such person under this chapter and to exercise the powers granted to or to perform the duties required of such person under this chapter. (Mar. 4, 1927, c. 509, §11, 44 Stat. 1431, U. S. C., Title 33, s. 911).

PERTINENT PROVISIONS OF THE CHILD LABOR LAW S. 36-204

S. 36-204 D. C. Code (1940 Ed.):

> No minor under sixteen years of age shall be employed, permitted, or suffered to work at any of the following occupations: (1) In the operation of any machinery operated by power other than hand or foot power; or (2) in oiling, wiping, or cleaning machinery or assisting therein. (May 29, 1928, 45 Stat. 999, ch. 908, s. 4)

§36-215 D. C. Code (1940 Ed.):

> Whoever employs or permits or suffers any minor to be employed or to work in violation of any of the provisions of sections 36-201 to 36-214, or of any order issued under the provisions of section 36-203, or interferes with, obstructs, or hinders the department enforcing the child labor law, its officers or agents, or any other person authorized to inspect places of employment under this chapter and whoever, having under his control or custody any minor, permits or suffers him to be employed or to work in violation of any of the provisions of sections 36-201 to 36-214, shall for a first offense be punished by a fine of not less than $25 nor more than $100, or by imprisonment not less than ten days nor more than thirty days, or in the discretion of the court by both such fine and imprisonment, and for any subsequent offense shall be punished by a fine of not less than $50 nor more than $200, or by imprisonment not less than thirty days nor more than ninety days, or in the discretion of the court by both such fine and imprisonment. Every day during which any violation of this chapter continues shall constitute a separate and distinct offense. (May 29, 1928, 45 Stat. 1003, ch. 908, §15).

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SUPREME COURT OF THE UNITED STATES

petition not printed

JERRY MCCABE _____ *Petitioner*

v. No. 1323

STATE OF ARKANSAS _____ *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

JERRY MCCABE ..... *Petitioner*

v. No. 1323

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARKANSAS

BRIEF FOR RESPONDENT

RESPONDENT'S STATEMENT OF THE CASE

Counsel for petitioner in both his petition and his brief has set forth the testimony given in the Sebastian Circuit Court, the action taken thereon by the Circuit Judge, and has furnished to the Court in the record, the exact page of which has not been furnished us, the opinion of the Supreme Court of Arkansas affirming the case.

There is only one question involved, which is set forth immediately hereunder.

The Question Presented

The sole question presented by petitioner is whether the trial court's actions in refusing to grant a mistrial and the action of the Supreme Court of Arkansas in affirming the trial court's judgment operated to permit petitioner's conviction without due process of law in violation of the 14th Amendment to the Federal Constitution.

ARGUMENT

I

No Federal Question is Properly before this Court and Consequently, the Petition for Writ of Certiorari Should Be Denied

In a great number of cases, including among them *Ark. So. Ry. Co.* v. *German National Bank* (Ark. 1907), 28 S. Ct. 78, 207 U. S. 270, 52 L. Ed. 201, and *St. L. I. M. & So. Ry. Co.* v. *Taylor* (Ark. 1908), 28 S. Ct. 616, 210 U. S. 281, 62 L. Ed. 1061, this Court has consistently held that in order to give this Court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it. 28 U.S.C.A. 344 (49).

The only place in the record (record page number not furnished us) that the question of whether petitioner was denied due process of law is found in the Motion for a New Trial presented to the Sebastian Circuit Court. Petitioner did not argue the Federal question in his brief which was filed in the Supreme Court of Arkansas and the Supreme Court in its opinion did not decide the case on that point, did not even mention it, and it was not necessary that it be decided by the Supreme Court of Arkansas. It, therefore, appears that this Court should not exercise its discretion and grant this petition.

All that is actually involved here is a question of evidence, nothing more, and petitioner has not furnished us nor this Court with any authority showing otherwise. As

a matter of fact, it boils down even further as being a case involving the weight of the evidence, and this is a further reason why this Court should not grant this petition.

In *Barrington* v. *Missouri* (Mo. 1907), 205 U. S. 483, 27 S. Ct. 582, 51 L. Ed. 890, this Court said that the admission of evidence in criminal cases which the highest State Court decided did not violate the rights of the accused under the State Constitution and laws cannot involve a question of due process of law of sufficient merit to sustain a writ of error. 28 U.S.C.A. 344 (90). Since it is not sufficient to sustain a writ of error it follows that it is not sufficient to sustain a petition for writ of certiorari.

In the instant case the Supreme Court of Arkansas specifically said:

> "What the Constitution guarantees, and a right Courts guard with meticulous care, is that every defendant against whom criminal accusations have been made is given 'a fair and impartial trial'. McCabe, Sloan, and Mondier, although jointly informed against, procured severance, and each was entitled to resulting benefits. By taking the reasonable man's viewpoint (assuming such exists) and considering the conditions under which objectionable testimony was brought out, we cannot believe that the jury regarded the identification by Shaw as substantive evidence or that its verdict turned upon this incident."

This is the only place in the opinion of the Supreme Court of Arkansas where the Constitution was mentioned and there the Court referred to the Constitution of the State of Arkansas, and then only to the extent that under said Constitution a man was guaranteed a fair and impartial trial.

To support our statement herein that the case boiled down to the weight of the evidence, we quote further from the opinion of the Supreme Court of Arkansas:

> "It is highly improbable that the verdict rested alone upon what Gerald Bradley said, that the jury convicted him without considering circumstances and facts within themselves sufficient."

This Court held, in *Whitney* v. *People of State of California* (Calif. 1927), 47 S. Ct. 641, 274 U. S. 357, 71 L. Ed. 1095, that objection that defendant convicted of violation of California Criminal Syndicalism Act (St. 1919, p. 281) was denied due process of law in violation of Constitutional U. S. Amendment 14 by being convicted of acts which became unlawful by reason of evidence following, held in effect an effort to review the weight of the evidence, and not properly reviewable in S. Ct.

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character." *McDonald* v. *Oregon, etc., Nav. Co.* (Or. 1914), 233 U. S. 665, 34 S. Ct. 772, 58 L. Ed. 1145. See also 28 U.S.C.A. 344 (114).

CONCLUSION

From the foregoing authorities it is apparent that this petition should be denied. No Federal question was properly raised, no Federal question was decided and it was not necessary in deciding the case for the Supreme Court of the State of Arkansas to decide this Federal question. There is involved here only a question as to weight of the evidence.

We, therefore, respectfully submit that petition for Writ of Certiorari herein should be denied.

Respectfully submitted

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